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No. 88-1426

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In The

Supreme Court of the United States

October Term, 1988

OMAHA INDIAN TRIBE,

Petitioner,

vs.

HAROLD JACKSON, ET AL.,

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT CO., ET AL.,

Respondents.

BRIEF FOR JOHN R. WILSON, ET AL. IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR JOHN R. WILSON, ET AL. IN OPPOSITION

STATEMENT OF THE CASE

This case has been pending since 1975. It has been the subject of three reported opinions of the district court,

United States v. Wilson, 433 F.Supp. 57 (N.D. Iowa W.D. 1977) ["Blackbird Bend I"], *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa W.D. 1981) ["Blackbird Bend II"], *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa W.D. 1984) ["Blackbird Bend III"]; four opinions of the Eighth Circuit Court of Appeals, *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) ["Omaha I"], *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980) ["Omaha II"], *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982) ["Omaha III"], *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), and a full opinion of this Court, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) ["Wilson"].

The Petitioner Omaha Indian Tribe[1] seeks review of the decision of the court of appeals in *Omaha IV*, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988). *Omaha IV* was a consolidation of separate appeals by the Tribe and the United States from the Final Judgment and Decree of the district court of May 29, 1987 as modified on June 30, 1987 (App.B p5a).[2] The Tribe's appeal was docketed in the Eighth Circuit Court of Appeals as *Omaha Indian Tribe v. Jackson*, No. 87-2042. The appeal of the United States was docketed as *United States v. Wilson*, No. 87-2191.[3] The Tribe was not a party to the appeal taken by

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[1] Petitioner will be referred to hereafter for convenience as the "Tribe."

[2] References to the Appendix to the Tribe's Petition will be to the Appendix Exhibit and page of the Appendix (App.___ p ___).

[3] The only issues raised by the United States in its separate appeal were with respect to the district court's disposition

(Continued on following page)

the United States, and the United States was not a party to the appeal taken by the Tribe. Respondents were parties, as appellees, to both appeals. The Tribe seeks review of so much of *Omaha IV* as decided the questions raised by the Tribe in its separate appeal.

This case involves a dispute over title to approximately 6,300 acres of farm land in an area known as "Blackbird Bend" on the Iowa side of the Missouri River, immediately opposite the Omaha Indian Reservation which lies on the Nebraska side. It began in 1975 with separate complaints by the Tribe and the United States as Trustee for the Tribe in the United States District Court for the Northern District of Iowa, Western Division (App.N p263a; App.O p269a). Both complaints sought recovery of the land as part of the Tribe's reservation. The Tribe claimed all of Blackbird Bend (and additional land not relevant here). The United States, as Trustee for the Tribe, claimed on behalf of the Tribe a smaller portion of

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(Continued from previous page)

of the improvements question. The United States was required to pay compensation for permanent improvements made by the Respondents to the land involved in this case as a precondition for obtaining a quiet title decree on behalf of the Tribe. The amount of compensation was stipulated between the United States and Respondents. The United States appealed from so much of the judgment as required the United States to pay interest on the amount of compensation from June 5, 1975, when the Respondents were dispossessed from the land, until the date of judgment. The United States also appealed from the district court's refusal to allow the United States to use, as a source of payment, the escrow fund into which the Tribe deposited crop proceeds during the pendency of the litigation.

land within Blackbird Bend known in this case as the "Barrett Survey Area" or simply the "Barrett Survey." The Barrett Survey contained approximately 2,900 acres and was indisputably part of the Tribe's reservation in the 1860s. The United States, however, excluded from its complaint approximately 700 acres of land within the Barrett Survey which had been patented in fee and conveyed free of trust status in the early nineteen hundreds.

The Omaha Indian Reservation was established in 1854 on the Nebraska side of the Missouri River by a treaty between the Tribe and the United States. The issue in the case was whether the movements of the Missouri River since 1854 (which resulted in the present location of the disputed land on the Iowa side of the river) destroyed the status of the land as reservation land. The Respondents, together with the State of Iowa, were the owners and occupants in 1975 of the land within the Barrett Survey.

In 1976 the district court entered two orders which defined the scope of the case, as it has since progressed through *Omaha IV*, by subject matter (the Barrett Survey) and by parties (the Tribe and the United States as Plaintiffs and the Respondents and the State of Iowa as Defendants). The first order (App.FF p395a) granted the Tribe's motion to consolidate its case with the case brought by the United States. The second order (App.GG p403a) severed the portion of the consolidated cases dealing with title to the Barrett Survey from the Tribe's claims to the larger Blackbird Bend area.

The outcome of the case turned on whether the river moved over the Barrett Survey by accretion or avulsion at

various times since 1854. The Tribe and the United States argued that the easterly and northerly movements of the river away from the Barrett Survey were accretive and that southerly and westerly movements of the river were avulsive with the result that the character of the land as reservation land remained unchanged. The Respondents argued that all the river movements were accretive, and that the westerly and southerly migration of the river destroyed the reservation land and replaced it with new land attaching to the Iowa bank of the river. The court of appeals in *Omaha IV* affirmed the Final Judgment and Decree of the district court (App.B p16a) entered on May 29, 1987 and modified in part on June 30, 1987. This Judgment and Decree was a final ruling on the title dispute within the Barrett Survey. It quieted title to approximately 1,900 acres in the United States as Trustee for the Tribe conditioned upon a reimbursement by the United States to the Respondents for improvements made to this land (which were agreed upon in amount); quieted title to approximately 670 acres in the State of Iowa; and quieted title to approximately 300 acres (the fee patent land) in the Respondents. The judgment did not dispose of any of the Tribe's claims to the remainder of Blackbird Bend.

In reaching its Judgment the district court applied the rules of decision laid down by this Court in *Wilson* and by the court of appeals in *Omaha II and III*. These included the following:

1. 25 U.S.C. §194[4] applied to shift the burden of proof to the Respondents, other than the State of Iowa, to prove the accretive nature of the river movements as these affected title to land within the Barrett Survey.

2. The Tribe had the burden of proving the avulsive nature of river movements as these affected title to lands claimed by Iowa.

3. The Tribe had the burden of proving the avulsive nature of river movements as these affected title to the area described by the fee patents.[5]

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[4] 25 U.S.C. §194 states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) this Court said

> . . . §194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute" *Id.* at 668.

The "possession" and "title" which triggered the application was the undisputed fact that the Barrett Survey was part of the Omaha Reservation when it was established in 1854. *Wilson* also held, however, that the State of Iowa was not a "white person" within the meaning of Section 194 and that the statute did not, therefore, apply to Iowa.

[5] The court of appeals in *Omaha III, United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982) held that the fee patent land which, by issuance of the patents, left trust status was an area as to which the Tribe could not show the possession or title necessary under *Wilson* to trigger the application of 25 U.S.C. §194.

The district court concluded that, because of the speculative nature of the evidence of the river movements, "no party can meet its burden of proving accretion or avulsion," *Blackbird Bend III*, (App.A p5a, at p8a). Thus, Iowa retained the land claimed by it (670 acres). The Respondents retained the fee patent land (300 acres). And the United States and the Tribe prevailed on the balance of the Barrett Survey land (1,900 acres).

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The questions raised in the Tribe's Petition, through nine in number, fall into four categories: (1) the priority or adequacy of the United States' respresentation of the Tribe in the separate suit filed by the United States as Trustee for the Tribe, (2) the limitation of the Final Judgment and Decree to the Barrett Survey, (3) the sufficiency under Rule 52 F.R.C.P. of the district court's findings of fact, and the imposition upon the Tribe of the burden of proof as to the fee patent land, and (4) the propriety of allowing the United States the use of the escrow fund from farming operations as a source for reimbursement to the Respondents for the value of improvements. None of these questions merits review by this Court under any of the grounds set forth in Rule 17 of the Rules of the Supreme Court of the United States. The Tribe fails to show that the decision of the court of appeals was in conflict with the decision of another federal court of appeals, Rule 17.1(a) or with any decision of this Court, Rule 17.1(c). Nor does the Tribe demonstrate that there is

an important question of federal law which should be decided by this Court, Rule 17.1(c). The matters raised by the Tribe are limited to the peculiar circumstances of this case. They have no impact beyond this case.

ADEQUACY OF REPRESENTATION BY THE UNITED STATES

The Tribe's first three questions have to do with the refusal of the court of appeals to hear, or direct the district court to hear, the Tribe's allegations of "fraud" and misconduct on the part of the United States. The essence of the "fraud" charge seems to be that the limitation of the separate complaint of the United States to the Barrett Survey and its omission of any claim to the fee patent land consummated a "fraud" upon the Tribe.

Regardless of the merit, or lack thereof, of these charges, it is impossible to comprehend how the Tribe has been prejudiced by the fact that the United States has claimed a smaller area of land in its separate complaint than the Tribe has claimed. The Tribe has been represented throughout this litigation by counsel of its own choice, largely at the expense of the Bureau of Indian Affairs. As to the Barrett Survey, where the complaints of the Tribe and the United States overlapped, the Tribe was successful in recovering all but the Iowa and fee patent land. Under the 1976 severance order the Tribe retains all of its claims to lands outside of the Barrett Survey. These are yet to be tried.

The Tribe complained about the presence of the United States in the case prior to the trial in 1976, but no charges of fraud were raised by the Tribe in any of the

later appeals or proceedings until the Tribe filed a Motion on November 7, 1985 to have the attorneys for the United States disqualified (App.U p321a).

The court of appeals refused in *Omaha IV* to consider the Tribe's fraud charges stating:

> In this appeal, the Tribe also maintains (1) that the Department of Justice attorneys engaged in fraud and collusion in their representation of the United States as trustee for the Tribe. . . . We find these claims to be without merit.
>
> The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976. However, the Tribe failed to again raise the issue until 1985 even though the case had been reviewed once by the Supreme Court and three times by this court. At that time, the district court held that the Tribe's motion to disqualify the government attorneys was "clearly untimely and merits no serious attention or consideration." The Tribe subsequently petitioned this court for a writ of mandamus alleging the same charges. This court not only dismissed the Tribe's petition as "frivolous and totally without merit" but also awarded the United States costs and attorney's fees as sanctions against counsel for the Tribe for filing "a totally frivolous pleading." *In Re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus). In view of the foregoing, this court unequivocally determined prior to oral argument that it would not entertain this meritless issue. (App.C p37a, at p40a)

LIMITATION OF JUDGMENT TO BARRETT SURVEY

The Tribe's fourth and fifth questions claim error by the lower courts in not extending the judgment in favor of the United States and the Tribe inside the Barrett Survey to lands claimed separately by the Tribe outside

the Barrett Survey in the larger Blackbird Bend area. The Tribe's argument is adequately answered by the court of appeals in footnotes 5 and 6 to its opinion in *Omaha IV* (App.C p37a, at pp44a, 48a). The points made in these footnotes are that:

1. The parties and subject matter of this case were defined by the 1976 consolidation and severance orders. As so defined, the case progressed, without objection by the Tribe, to trial and through all of the many appeals following trial.

2. The Tribe will have to carry the burden of proof in establishing its claims outside the Barrett Survey, since 25 U.S.C. §194 would not apply outside the Barrett Survey to shift that burden to the landowners.

3. There are landowners who, because of the severance order, did not participate in the trial of the Barrett Survey portion of this case and whose rights would be denied if the judgment in favor of the Tribe were extended outside the Barrett Survey.

4. The Barrett Survey portion of the case has proceeded as an equitable quiet title action. The Tribe's claims outside the Barrett Survey will be an action at law for ejectment, and the affected landowners may have the right to trial by jury.

RULE 52 F.R.C.P. AND ALLOCATION OF THE BURDEN OF PROOF ON FEE PATENT LAND

The Tribe's sixth question takes issue with the refusal by the court of appeals to require the district court to adopt more extensive findings of fact. The facts of this

case were detailed by the district court in *Blackbird Bend I and II* and were reviewed by the court of appeals at length in *Omaha I, II and III* and by this Court in *Wilson*. It was not necessary that the district court adopt additional findings in *Blackbird Bend III*. The court of appeals stated:

> . . . findings of fact 'are adequate if they afford a reviewing court a clear understanding of the basis of the trial court's decision. *Lynch Corp. v. MII Liquidating Co.*, 717 F.2d 1184, 1187 (8th Cir. 1983)', *Omaha IV*, (App.C p37g, at p42a).

The court concluded that the findings in *Blackbird Bend III* were adequate for purposes of its review.

The Tribe in its seventh and eighth questions challenges the imposition of the burden of proof on the Tribe in its claims to the fee patent land. This burden was imposed by the court of appeals in *Omaha III*. The court in *Omaha III* followed the "area" analysis of this Court in *Wilson*, and held that 25 U.S.C. §194 would not apply within the area described by the fee patents since this area, by virtue of these patents, was removed from reservation and trust status, and the prior possession and ownership necessary to trigger the application of 25 U.S.C. §194 was, therefore, lacking. The court of appeals in *Omaha III* directed the district court to review the evidence to determine whether the Tribe could sustain the burden of proof of the nature (avulsive or accretive) of all river movements necessary to its claim to the fee patent land. This was the same burden of proof that the Tribe had to carry against the State of Iowa to whom 25 U.S.C. §194 did not apply. The district court in *Blackbird Bend III* followed the *Omaha III* mandate and concluded that the Tribe, without the aid of 25 U.S.C. §194, could not

sustain its burden of proof against Iowa nor could it sustain its burden of proof with respect to the fee patent land. The court of appeals in *Omaha IV* affirmed on the basis that the district court correctly carried out the *Omaha III* mandate and that its findings were not clearly erroneous.

USE OF ESCROW FUNDS BY UNITED STATES

The court of appeals in *Omaha III* held that the United States as Trustee for the Tribe would be required to reimburse the Respondents for the value of the permanent improvements which they and their predecessors made to the land. The Final Judgment and Decree of the district court determined the amount due as reimbursement based upon stipulations entered into by the Respondents and the United States. In the modification to its Final Judgment and Decree, the district court refused to allow the United States access to escrow funds from the Tribe's farming operations on the Barrett Survey land as a source of payment.[6] The court of appeals reversed on this point holding that the United States could use this fund. The court applied general common law principles to the effect that a trustee is entitled to reimbursement from a trust estate for expenses incurred for the benefit of the trust beneficiary. *Omaha IV* (App.C p44a)

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[6] The Tribe was placed in possession of the Barrett Survey land in 1975 at the inception of the case by a preliminary injunction (App.M p256a). The order granting the injunction required all net profits from farming operations to be deposited with the clerk of court pending final judgment.

CONCLUSION

None of the actions taken by the court of appeals and complained of by the Tribe is such as to warrant review by this Court. There is no issue of federal law, or its application, which merits the attention of this Court. The Tribe's Petition For a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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